

Tulsa Law Review

Volume 42
Issue 3 *Supreme Court Review*

Spring 2007

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Recommended Citation

John T. Noonan Jr., *The Religion of the Justice: Does It Affect Constitutional Decision Making*, 42 Tulsa L. Rev. 761 (2013).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol42/iss3/11>

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REMARKS

THE RELIGION OF THE JUSTICE: DOES IT AFFECT CONSTITUTIONAL DECISION MAKING?

John T. Noonan, Jr.*

“[N]o religious test shall ever be required as a qualification to any office or public trust under the United States.”¹ Here, in the body of the Constitution, antedating the First Amendment, is the first commitment of our country to religious freedom in the sense of the eligibility of every citizen, whatever his or her religion, to be appointed to federal office. At a time when religious tests were still employed by states such as Massachusetts and New Hampshire to limit state office to Protestants, this provision was a bold and sweeping challenge to religious bigotry. In its light, should we ever be concerned about the religion of a judge?

Human nature being what it is, there cannot help being some inquiry as to the impact of religion on a judge’s decisions. To some persons it may seem particularly relevant when, for the first time in the nation’s history, five members of the Supreme Court of the United States are Catholics. On this sensitive subject, speculation, I believe, is neither appropriate nor useful. To answer the question in my title, I shall resort to history and to my own experience.

Twenty-five years ago I wrote a paper on the five Justices of the United States Supreme Court who had identified themselves as Catholics and who, as they were no longer alive, I could comfortably discuss.² They were, in chronological order, Roger Taney, Chief Justice from 1836 to 1864; Edward Douglass White, Justice from 1894 to 1910, Chief Justice from 1910 to 1921; Joseph McKenna, Justice from 1898 to 1925; Pierce Butler, Justice from 1922 to 1939; and Frank Murphy, Justice from 1940 to 1949. I asked if their membership in the Catholic Church had had any discernible impact on their judicial decisions.³

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1. U.S. Const. art. VI, § 3.

2. John T. Noonan, Jr., *The Catholic Justices of the United States Supreme Court*, 67 *Cath. Historical Rev.* 369 (1981).

3. *Id.* at 371. Sherman Minton, an Associate Justice from 1949 to 1956, became a Catholic in 1961. *Id.* at

Taney, of course, was a slaveholder from Maryland, most famous in history for his opinion in *Dred Scott v. Sandford*.⁴ I did not see that his religion prompted his decision, although it did not discourage it. The Jesuits had been slave owners in Maryland until 1838.⁵ But even Justice Curtis, who resigned in disgust at the decision,⁶ did not suggest that it had religious roots. As far as I could see, Taney's work was what might have been expected of a Jacksonian Democrat. In a very different case, Taney exhibited an unusual delicacy in conscience in refusing to adjudicate the constitutionality of a federal income tax that reduced the effective compensation of federal judges.⁷ I would not ascribe this refusal to his religion, either.

White, a former Confederate officer, was appointed by Grover Cleveland, who, according to a probable story, was impressed by his Mass-going on a Sunday.⁸ He was made Chief Justice by a Republican president, Taft, reaching out to Catholic voters.⁹ In White's day there was a Protestant-Catholic consensus on moral values, especially as to sex, with a division on divorce. As a Justice, White wrote a notable opinion on divorce, *Haddock v. Haddock*.¹⁰ The official Catholic position was that the state had no power to dissolve a marriage.¹¹ Therefore a Catholic judge could not participate in a divorce. *Haddock* held that a husband could not move from New York to Connecticut and sue his wife, still resident in New York, for divorce in his new state.¹² White accepted state jurisdiction over divorce¹³ at the same time he discouraged divorce in a jurisdiction that made it easier.¹⁴ His opinion did not follow a narrow Catholic line.

McKenna, a congressional buddy of McKinley who appointed him, was the least distinguished of the five but wrote one great opinion, *Weems v. United States*,¹⁵ holding that cruel and unusual punishment was not to be determined by eighteenth-century precedent but by evolving standards of human decency.¹⁶ It is tempting to attribute this insight to a conscience enlightened by religion, but Justice White (as well as that other old soldier Justice Holmes) dissented.¹⁷

Justice Holmes was the one with whom Pierce Butler disagreed in the case of the forced sterilization of Carrie Buck in *Buck v. Bell*.¹⁸ "Three generations of imbeciles are

370 n. 1. I do not include him in the survey.

4. 60 U.S. 393 (1856).

5. John T. Noonan, Jr., *A Church That Can and Cannot Change: The Development of Catholic Moral Teaching* 106 (U. Notre Dame Press 2005).

6. Stuart Streichler, *Justice Curtis in the Civil War Era: At the Crossroads of American Constitutionalism* 145 (U. Va. Press 2005).

7. Noonan, *supra* n. 2, at 381.

8. *Id.* at 373.

9. Walter F. Pratt, Jr., *The Supreme Court under Edward Douglass White, 1910-1921* 19 (U. S.C. Press 1999).

10. 201 U.S. 562 (1906).

11. Noonan, *supra* n. 2, at 377.

12. *Haddock*, 201 U.S. at 574.

13. *Id.* at 573.

14. *Id.* at 574.

15. 217 U.S. 349 (1910).

16. *Id.* at 380-81.

17. *Id.* at 382-413 (White & Holmes, JJ., dissenting).

18. 274 U.S. 200 (1927).

enough,”¹⁹ Holmes famously pronounced and privately noted “the religious are astir.”²⁰ But Justice Butler dissented without opinion,²¹ so no expression of his views, religious or otherwise, was recorded.

Frank Murphy, attorney general under Roosevelt, was the President’s choice to succeed Butler, as if “a Catholic seat” on the Court had to be filled.²² As a political figure, Murphy was the opposite of Butler, who was a former corporate lawyer. Often joining the old Ku Klux Klanner, Hugo Black, Murphy did disagree with him in one notable instance: the Japanese internment case, *Korematsu v. United States*,²³ describing the result of the majority opinion as a “legalization of racism.”²⁴ Again, it is tempting to ascribe this conscientious position to a religious conscience, but evidence is lacking.

Since I wrote of these five men, a sixth Catholic Justice, William Brennan, has died. I knew him slightly and several of his clerks better. One federal judge I knew who knew him did not regard him as a Catholic, but I always accepted him as he presented himself, accepting from the University of Notre Dame in 1969 the Laetare Medal awarded to an outstanding American Catholic. In *Eisenstadt v. Baird*,²⁵ in striking down the Massachusetts law prohibiting the distribution of contraceptives,²⁶ he invalidated a law passed under Protestant auspices in 1879²⁷ and vigorously championed by Cardinal O’Connell in the 1940s.²⁸ But it was a law no longer supported by Cardinal Cushing, O’Connell’s successor, in 1961.²⁹ So the decision itself did not depart from evolving Catholic doctrine.

Brennan’s language in *Eisenstadt* on reproductive freedom was subsequently the foundation of *Roe v. Wade*,³⁰ in which he joined. I have not understood how a Catholic or any judge who was guided by the terms of the Constitution could conscientiously do so. But obviously Catholic consciences differ. Brennan in *Roe* showed that they can differ on abortion. It is not, I think, the business of anyone to judge the conscience of another.

I turn to Catholic Justices who are alive, whom I do know in varying degrees, and who have participated in decisions of the Supreme Court where religion could have played a part. In the abortion cases, precedent introduced a value not present in *Roe v. Wade*; otherwise, Justice Kennedy’s position in *Planned Parenthood v. Casey*³¹ is as unexplained in religious terms as Justice Brennan’s. As for the two Catholic dissenters,

19. *Id.* at 207.

20. *Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski, 1916–1935* 938 (Mark DeWolfe Howe ed., Harv. U. Press 1953).

21. *Buck*, 274 U.S. at 208 (Butler, J., dissenting).

22. Noonan, *supra* n. 2, at 382.

23. 323 U.S. 214 (1944).

24. *Id.* at 242 (Murphy, J., dissenting).

25. 405 U.S. 438 (1972).

26. *Id.* at 443.

27. Mass. Gen. Laws Ann. ch. 272, § 21 (West 2000) (repealed 2004).

28. John T. Noonan, Jr., *The Lustre of Our Country: The American Experience of Religious Freedom* 20 (U. Cal. Press 1998).

29. J. Leon Hooper, *The Ethics of Discourse: The Social Philosophy of John Courtney Murray* 90–91 (Geo. U. Press 1986).

30. 410 U.S. 113 (1973).

31. 505 U.S. 833 (1992).

Justices Scalia and Thomas, strict adherence to the meaning of the Constitution would account for their votes as readily as their religion. Their fellow dissenters, Chief Justice Rehnquist and Justice White, were not influenced by Catholic beliefs.

On school prayer, Justice Kennedy has been a purist in rejecting it³² Justices Scalia and Thomas accommodationists in allowing it.³³ On financial aid to individuals attending religious schools, all three have been accommodating.³⁴ On neutral laws that impact religious practice without targeting it, all three have upheld legislation with negative impact on a church or religious practice.³⁵ They have even gone further by declaring unconstitutional the attempt of Congress to remedy their work by the Religious Freedom Restoration Act.³⁶ It is hard to fit these patterns of voting into profiles of Catholics voting to advance their beliefs.

On an issue with no overt religious implications, I would like to think that a Catholic conscience is reflected in Justice Kennedy following Justice McKenna in insisting that gross disproportionality in sentencing is cruel and unusual punishment.³⁷ But Justice Scalia's view that proportionality cannot be determined³⁸ is a counter to this speculation. More generally, in the course of 170 years of Catholics on the Supreme Court, it does not appear that the identification of a Justice as a Catholic carries with it predictive value as to his vote. I abstain from speculation about the new Catholic Justices, Chief Justice Roberts and Justice Samuel Alito.

I have picked the Catholic Justices to examine, partly because they constitute a small, compact group and partly because I know more of their formal beliefs than those of another group. I have, however, little doubt that similar conclusions could be drawn by looking at the even smaller group of Jewish Justices: Louis Brandeis, Benjamin Cardozo, Felix Frankfurter, Arthur Goldberg, Abe Fortas, Ruth Bader Ginsburg, and Stephen Breyer. None, I believe, could be counted as Orthodox. All share a Jewish heritage. I doubt that one could find a single tenet of Judaism that played a decisive part in their decisions. As individuals, who could have been more different in their approach to judging than Brandeis and Fortas or than Cardozo and Frankfurter? In passing, I note that no Catholic could have written an opinion more respectful to canon law than Justice Brandeis in *Gonzalez v. Roman Catholic Archbishop of Manila*.³⁹

I assume that the same variety of approaches would be found among the vast majority of Justices who were Protestants, with Episcopalians making up almost one-third and Presbyterians over one-sixth. No one has suggested that there is an Episcopalian or Presbyterian color to any Court's decision. Is that because there has been less American prejudice against these denominations than against Catholics or Jews? Or is it because the moral doctrines of these denominations are thought to be less

32. *E.g. Lee v. Weisman*, 505 U.S. 577, 599 (1992).

33. *Id.* at 631 (Rehnquist, C.J. & Scalia, White & Thomas, JJ., dissenting).

34. *E.g. Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13–14 (1993).

35. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

36. *Id.* at 511.

37. *Harmelin v. Mich.*, 501 U.S. 957, 996–98 (1991) (Kennedy, O'Connor & Souter, JJ., concurring in part and concurring in the judgment).

38. *Id.* at 994 (plurality).

39. 280 U.S. 1 (1929).

rigid than the Catholics'? I suggest that if Catholic or Jewish Justices had been as numerous as Episcopalian Justices, the idea that the Catholic's religion predicted his vote would have died long ago.

No doubt there are or have been Justices who associated themselves with no religious tradition. Justice Douglas comes to mind as an example. Only Justice Holmes openly made a point of his religious skepticism.⁴⁰ I see his traumatic experiences in the Civil War as having far greater impact on his decisions than his religious opinion.

I supplement my reading of history by my experience as a judge who is a believing Catholic and is sworn to uphold the Constitution of the United States. First, as to abortion. Early in my life on the circuit, I was asked to deal with the case of an employee of the California Health Department, who, without the department's permission, had appeared before the California legislature to oppose a bill restricting abortion.⁴¹ She had been disciplined for this action and sued the department, claiming that her constitutional freedom of speech and freedom to petition had been violated.⁴² I wrote the unanimous opinion upholding her contentions.⁴³ I had no doubt that what she advocated should not influence our decision in the case.

Later I sat on a case from Everett, Washington, where an abortion clinic had brought a RICO action against anti-abortion picketers of the clinic.⁴⁴ Neither I nor my two colleagues, Judges Hug and Thompson, thought that a Catholic was disqualified from hearing the case. We all agreed in an opinion by Judge Hug, vacating on res judicata grounds a judgment in favor of the clinic.⁴⁵ Belatedly, after we had heard argument and reached our decision but before it was published, the clinic formally moved for my recusal.⁴⁶ In a published opinion I denied the motion and explained my conclusion.⁴⁷

To my mind, the decisive precedent was offered by Thurgood Marshall. Before being a judge, Marshall had been very active in the cause of racial justice, in particular as counsel for the NAACP. Marshall on that account did not recuse himself in cases where justice to African Americans was an issue. It would have been absurd for him to do so. He had been appointed because he understood these issues. I concluded that an American judge was not expected to come to a court without commitments on the great public issues of his day and that on abortion, in particular, neither a pro-abortion or anti-abortion history constituted disqualifying bias if one could judge the case before one fairly.⁴⁸ The appearance of bias that one's history suggested could not be a factor if American judges were to come, as they did come, out of a highly political process. I added, for good measure, that Orthodox Judaism, the Mormon Church, and many

40. Albert W. Alschuler, *Law without Values: The Life, Work, and Legacy of Justice Holmes* 25 (U. Chi. Press 2000).

41. *Johnston v. Koppes*, 850 F.2d 594, 595 (9th Cir. 1988).

42. *Id.*

43. *Id.* at 597.

44. *Feminist Women's Health Ctr. v. Codispoti*, 63 F.3d 863, 865 (9th Cir. 1995).

45. *Id.* at 866.

46. *Feminist Women's Health Ctr. v. Codispoti*, 69 F.3d 399, 400 (9th Cir. 1995).

47. *Id.* at 400-01.

48. *Id.* at 400.

Protestant denominations viewed abortion as sinful.⁴⁹ Were only approvers of abortion fit to judge the case of an abortion provider? I did not think that judicial impartiality required so much. If every judge who was pro- or anti-abortion were disqualified from deciding an abortion case, the judiciary would be crippled. The same holds true as to every great issue on which public opinion is divided and on which every politically conscious person has convictions, often formed or aided by his religious commitments. To make those commitments a test for holding judicial office would violate, or come dangerously close to violating, Article VI of the Constitution and its ban on religious tests.

At the other end of life was a case from Washington challenging the statute criminalizing assistance to suicide.⁵⁰ At the suit of several physicians, the district court held the statute an unconstitutional invasion of a private zone of personal autonomy.⁵¹ I thought the matter a straightforward application of constitutional principle. My own religious scruples about suicide were not relevant. No litigant suggested that they were. I wrote the two-to-one opinion of the panel reversing the district court.⁵² The circuit, en banc, eight to three, promptly reversed me,⁵³ only to be in turn reversed by the Supreme Court, nine to zero.⁵⁴ In retrospect, I read this unanimous agreement with my decision as strong evidence that not religion but fidelity to the Constitution and judicial precedent provided proper guidance in deciding the case.

A different kind of end-of-life question is posed by the death penalty. My colleague Alex Kozinski has written an elegant article for *The New Yorker* entitled *Tinkering with Death*,⁵⁵ but I have not had a case requiring me to impose death. I have sat only on cases where a state court has imposed death and the federal court has been asked if the federal Constitution was violated in the process. We have had power only to correct an error of federal constitutional significance. True, if we found no such error, the petitioner would be executed. The lay public might read our opinion as blessing the execution. I did not think that such a misreading of our function was a reason for seeing myself as a cooperator in the state's taking of life.

It is true that on the moral legitimacy of the death penalty Catholic teaching has changed. Once accepting it as a necessary prerogative of government, the Catholic Church under Pope John Paul II has taught that death can only be imposed in rare circumstances and not at all if the defendant can be securely imprisoned.⁵⁶ There is a certain hesitancy in the teaching, whose logic leads to the conclusion that a state-sponsored execution is state-sponsored homicide; the pope and bishops do not denounce the government as guilty of murder but only plead for clemency. The doctrinal development is not complete. Yet I am glad never to have had to face a case where my

49. *Id.*

50. *Compassion in Dying v. Wash.*, 49 F.3d 586 (9th Cir. 1995).

51. *Id.* at 589.

52. *Id.* at 588.

53. *Compassion in Dying v. Wash.*, 79 F.3d 790, 798 (9th Cir. 1996) (en banc).

54. *Wash. v. Glucksberg*, 521 U.S. 702, 709 (1997).

55. Alex Kozinski, *Tinkering With Death*, 72 *New Yorker* 48 (Feb. 10, 1997).

56. Pope John Paul II, *Evangelium vitae* § 56 (Mar. 25, 1995) (available at http://www.vatican.va/edocs/ENG0141/_PP.HTM).

vote would have confirmed the death sentence.

Justice Scalia, who seems reluctant to recognize the doctrinal change, has written that if it has really occurred, all Catholic judges should resign as incapable of carrying out the law.⁵⁷ I read that statement as a rhetorical move. A federal judge rarely is asked to impose or to uphold a sentence of death. If the judge is conscientiously convinced that any taking of human life cannot be justified, it is, I believe, his duty to disqualify himself if the law requires imposition of death. I do not think that a rare recusal carries with it a declaration of incompetence to function as a judge ninety-nine percent of the time.

I turn to an even rarer case, the case of the confession bugged in the county jail of Eugene, Oregon.⁵⁸ Having arrested Conan Hale, the probable murderer of three teenagers, his jailers decided to tape his confession to a Catholic priest. The tape was turned over to the district attorney, who proposed to introduce it at Hale's trial. Oregon by statute protected priest-penitent communications from forced disclosure but said nothing about recording. Word of the taping leaked out. The priest and Archbishop George of Portland asked the state court to suppress it; the court firmly informed them that they had no standing to intervene.⁵⁹ They sought relief in the federal district court, which held itself constrained by precedent not to interfere with an ongoing state prosecution.⁶⁰ On appeal to the Ninth Circuit I heard the case together with David Thompson and Andrew Kleinfeld.⁶¹

Our combined research disclosed no case where a sacramental confession had been admitted as evidence in a criminal trial.⁶² Where it had been attempted in 1813 in New York City, Mayor DeWitt Clinton, presiding as Recorder, held that such an interference with Catholic practice would violate the freedom of religion enjoyed by all Americans.⁶³ By statute or by court decision, the sanctity of confession had, ever since, been preserved.

I was conscious that, as a Catholic, I was sensitive to the prosecutorial invasion. However, I also saw that my two colleagues, one Protestant and one Jewish, were equally taken aback and that Mayor Clinton and all the states that protected the secrecy of confession were not doing so in deference to Catholic teaching but out of respect for a religious rite of significance to one portion of the public. I did take note that Conan Hale, a baptized Christian, was canonically eligible to receive the sacrament, though not a Catholic.⁶⁴ I also observed that in the federal district court Hale had disclosed the substance of his confession: "I made confession and asked for God to forgive me for . . . being angry with the District Attorney for believing Susbauer instead of me."⁶⁵ Hale had waived the penitent's privilege and, incidentally, revealed that the whole business was a ruse setting up the district attorney. But the priest had not waived his justified

57. Antonin Scalia, *God's Justice and Ours*, First Things 17, 21 (May 2002).

58. *Mockaitis v. Harcleroad*, 104 F.3d 1522 (9th Cir. 1997).

59. *Id.* at 1526.

60. *Mockaitis v. Harcelroad*, 938 F. Supp. 1516, 1520 (D. Or. 1996).

61. *Mockaitis*, 104 F.3d 1522.

62. *Id.* at 1533.

63. *Id.* at 1532.

64. *Id.* at 1525.

65. *Id.* at 1527.

expectation of privacy, so the bugging had violated the Fourth Amendment as an unreasonable search.⁶⁶ A second string to our bow was the Religious Freedom Restoration Act, still of constitutional validity at the time of our decision.⁶⁷ The state did not seek review nor did it challenge my impartiality. No judge of the Ninth Circuit questioned my opinion. I have no doubt that the result we reached would have been the same if any other member of our court had sat in my place.

One might conclude from my review of my own experience as well as from the history of Catholic Justices of the United States Supreme Court that religion is sometimes relevant as one strand in a judge's mind. Religion, however, does not regularly predict how a judge will vote on a constitutional question. It does not furnish an explanation of how the judge voted. It does not regularly distinguish the judge from colleagues who do not share his religious beliefs. That conclusion seems true as to the Justices whose opinions I have examined and true of my own experience. At the same time, this way of measuring the impact of belief on a judge's action seems to me crude and blundering.

One reason is that the major religions are complex compositions, containing a variety of commandments understood in terms of tradition and theological interpretation. You cannot isolate a single, simple precept and assume that it will determine a judge's behavior. Let me give three illustrations.

In the Gospels, Jesus tells his followers, "Judge not, that ye be not judged."⁶⁸ The command is clear and apparently comprehensive. If it were taken literally, no Christian would be a judge. So far as I can determine, no major Christian denomination has ever taken these words as a prohibition of the profession of judging. The command has been qualified and treated as irrelevant to professional judges.

My next two examples are of fundamental texts. The Ten Commandments, set out in *Exodus* and repeated in *Deuteronomy*, are often seen as a succinct summary of basic moral duties and are sometimes proposed as appropriate for public buildings. Two of the commandments contain an implicit acceptance of human slavery as an institution—the commandment on keeping the Sabbath, which includes a specific provision for rest by the slaves,⁶⁹ and the commandment against covetousness, where the objects not to be coveted include your neighbor's slave and slave girl.⁷⁰ No one today argues from these texts that slavery is approved by God. No judge would use these sections of the commandments in interpreting American law outlawing slavery. The tremendous change in attitude and culture that began slowly about 1690 and culminated in the Civil War has made biblical argument in favor of slavery obsolete and unthinkable.

As a third example, "love thy neighbor as thyself" is put forward by Jesus in the Gospels as central to his teaching.⁷¹ Could any judge say that he loves a defendant as himself when he sentences the defendant to death or to prolonged incarceration? It is

66. *Mockaitis*, 104 F.3d at 1533.

67. *Id.* at 1528–31.

68. *Matthew* 7:1 (King James); *Luke* 6:37 (King James).

69. *Exodus* 20:10 (King James); *Deuteronomy* 5:14 (King James).

70. *Exodus* 20:17 (King James); *Deuteronomy* 5:21 (King James).

71. *Mark* 12:31 (King James).

evident, I think, that Christian judges understand their professional role to qualify the fundamental Christian command. Tradition has modified its radical force.

There is a second and larger reason than the complexity of religion as to why one cannot go directly from a judge's religion to his judicial behavior. What enters into a judge's judgment is the judge's experience of life. It is not the party of the president who appointed him—a peculiarly gross way of predicting or accounting for the judge's acts, although a way often mechanically adopted by journalists. It is not solely the judge's prior experience as a litigator, a prosecutor, a bureaucrat, a corporate counselor, a civil rights activist, or a law teacher, although any one of such careers will have contributed to the judge's thinking. It is not solely the judge's childhood or his relations with his parents or his relationship to his spouse or to his children, if he has any. All of these relationships help mold the mind, the sensibility, the capacity for empathy that affect judgment. Education at every level from kindergarten to law school makes a difference too, in the best way by enabling the judge to make distinctions, see implications, and comprehend complexities and depth. In short, myriad are the influences that have gone into making the judge the person the judge is. The small segment of experience constituted by religious belief must mesh with the rest of the myriad. It was once written in praise of Henry James that he "had too fine a mind to have an idea"⁷²—that is, James could not be read as writing from anything but an empathetic identification with the characters he cherished as persons. So, too, a judge should be seen as responding to the persons in the case before him, bringing not ideology but the response of a person to a person within the context cast by law. That response should be shaped by conscience.

Judges, especially appellate judges, suffer little supervision. If they procrastinate in deciding a difficult case, nothing happens to them. If they let a law clerk not only write the opinion but master all the facts of a case in their stead, no reproach will reach them. If they pursue a policy rigidly, regardless of the persons before them, no one will point out their preference for abstractions. Their only effective supervisor is their conscience, reminding them that what they do has an impact on the lives of other human beings.

Every person, I venture to affirm, has a conscience. A judge is no exception. Whether that conscience is formed by formal religion or parental exhortation or the lessons of life, or all such influences, the judge will respond to the persons before him guided by this inner guide. To act against it, as a judge is capable of doing, is to make oneself an unhappy person. The better that it is integrated with the judge's beliefs the surer and finer will be his judgment. To invoke a person of great experience in public life, Winston Churchill said, in tribute to Neville Chamberlain, "[t]he only guide to a man is his conscience; the only shield to his memory is the rectitude and sincerity of his actions. It is very imprudent to walk through life without this shield."⁷³

Conscience, of course, is a theological concept. It appears not by name but by

72. F.W. Dupree, *Henry James* 23 (William Sloane Assocs. 1951).

73. Winston S. Churchill, Speech, *Neville Chamberlain* (House of Commons, Nov. 12, 1940) (available at www.winstonchurchill.org/i4a/pages/index.cfm?pageid=421).

functional equivalent in the Hebrew Bible. It appears in Christian theology as the way God communicates to a human being. It has become a secular term in modern America, even appearing in the Federal Rules of Civil Procedure, where Rule 19 instructs courts to decide the indispensability of a party “in equity and good conscience.”⁷⁴

Frankly, I find it difficult to understand the trust put in conscience when its theological roots are cut. (I do not doubt the sincerity of the conscientious atheist—only his explanation for his certainty.) But as long as there is a consensus that conscience is key, I will no more quarrel with another’s understanding of its power than I would judge the conscience of another. From my perspective, it is this conviction at one’s inner core, uniting principles and experience and empathy, that counts most in judging. It is here that the religion of the judge—not just this or that particular precept but the whole thrust of the judge’s commitment to God—can make a difference. To measure that difference, however, belongs not to any human but to God.

74. Fed. R. Civ. P. 19.